IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 489

UTAH PIE COMPANY, *Petitioner,*

v.

CONTINENTAL BAKING COMPANY, CARNATION COMPANY, and PET MILK COMPANY, *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF

This brief response to petitioner's Reply Brief is submitted only to respond to petitioner's belated argument that a conflict among certain circuits exists requiring this Court's review and reversal of the carefully considered decision of the Tenth Circuit Court of Appeals in this case. Although one of the cases petitioner now relies upon was decided last June, petitioner did not argue this alleged conflict in its initial Petition and Brief.

Petitioner now relies on two cases to claim a conflict. *National Dairy Prods. Corp.* v. *United States,* CCH 1965 Trade Cas. ¶ 71,541 (8th Cir. 1965), and *Lloyd A. Fry Roofing Co.* v. *Volasco Products Co.,* 346 F.2d 661 (6th Cir. 1965). A brief comment as to each of

these cases will disclose that there is, in fact, no conflict whatever among these jurisdictions and the Tenth Circuit as is now contended by petitioner. Each of these cases was decided on its own facts and any attempt to read into them, or any one of them, some universal rule of law either invigorating or debilitating the Robinson-Patman Act is unintelligible.

In the *Lloyd A. Fry* case the evidence showed that defendant had consistently for more than a year sold in plaintiff's trading area at a price lower than the prices it was receiving elsewhere, and at a price lower than plaintiff's price. The simple fact distinguishing the *Fry* case from the proof relied upon against Continental is that Continental did not consistently sell in petitioner's trading area at a lower price than it sold elsewhere but, instead, charged lower prices in petitioner's trading area only during two two-week periods in June-July 1961. Moreover, for all the rest of the complaint period Continental's prices were *higher* than petitioner's. Plt's Ex. 4; Ex. M-26. The evidence of this one short-term price difference was unaccompanied by any proof of intent by Continental to injure petitioner or anyone else, and was in fact made by a seller so marginal in the relevant market as to have made any such attempt to injure its competitors altogether ludicrous.

In the *National Dairy Products* case, the Eighth Circuit simply held that sales below fully distributed cost were one relevant element to be considered in connection with the rest of a record which described what can only be called truly predatory competitive practices requiring, in the trial court's judgment, maximum fines. The Court of Appeals was careful to point out that "of course, such sales below cost were not

sufficient, standing alone . . ." to prove liability and that the government had to prove they "were concomitant with a predatory intent." 1965 CCH Trade Cas. at 81,414.

Completely consistent with this holding, the Tenth Circuit Court of Appeals in the present case looked at the evidence of Continental's sporadic sales below cost which generated an overall profit and, in the light of a record containing absolutely no other "evidence" of predatory intent on the part of Continental, held that Continental's sporadic sales by themselves could not support a finding of possible adverse effect upon competition.

For the reasons stated herein, it is submitted that petitioner's Reply Brief fails to advance any ground warranting the issuance of the Writ prayed for. The Petition should be denied.

Respectfully submitted,

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